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Electronic Delivery of Information The Changing Face of Legal Structures

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A Sampling of Information Products Delivered in Electronic Format

Delivered On-Line, by Disc, CD-ROM, Digitized Tape

- **On-line news feeds/daily financials**
- **Multimedia Works**
- **Computer Software**
- **Image Collections**
- **Databases (bibliographic, informational, general data)**
- **Information Collections (maps, encyclopedias, foreign language dictionaries)**
- **Electronic Journals**
- **Copyrighted or trade secret information reference materials accessed electronically (via computer)**

Electronic Delivery of Information

A New “Rights Regime” for Libraries

- ☞ **Old:** Copyright Law (U.S. and Foreign)
- ☞ **New:** Contract Law as Licenses replace Subscription forms
- ☞ **New:** European Directive For Database Protection
- ☞ **New:** Pending U.S. Database Legislation
- ☞ **New:** Trade Secret Law for Proprietary Databases

The Information License

Mechanism “du Jour” for Protecting Products

Licenses Redefine the Way Libraries do Business

- They may close the library door except to authorized “users”
- They will remove resources from the library’s facilities and control if accessed only via publisher’s server
- Licenses most Often do not permit/cannot accommodate archiving
- Licenses may restrict the “purpose” for which the resource is used
- Licenses nearly always pre-empt at least some basic elements of Copyright
- Licenses are signed contracts that introduce institutional liability for misuse of the product or breach of the agreement

A License is a Contractual Agreement

- ☞ Between one party who owns or controls property (“rightsholder, licensor, copyrightholder, publisher”) and a second party who wants rights to use the property (“licensee, user, library/institutional community”)

...and, in the process of agreeing between themselves as to what rights the owner will grant, under what conditions and what is expected in return from the user, the parties are entering into a relationship based on consensus, governed by the law of contracts.

- ☞ Except for matters of Public Policy, what the parties agree to will over-ride underlying laws (i.e. Copyright Law - prime example is ILL)

What a License is and What it is Not

☞ A license is a legal contract that describes rights granted

☞ A License does not result in a sale of property.

. . . It does not transfer ownership of the electronic product (database, journal, i.e. goods) or the information embodied in the product (content) to the purchaser. At best, it transfers only ownership of the physical media (disk, CD-ROM, tape), and a right to use the information under certain circumstances

Five Basic Elements of a Contract will be found in All License Agreements

- ☞ **Offer:** Promise by owner of the product to provide it if the offer is accepted. Identifies what is offered, price, time open, acceptance
- ☞ **Acceptance:** Will identify who can accept for the parties and what constitutes acceptance
- ☞ **Consideration:** Must be a detriment to User
- ☞ **Mutuality of Understanding:** The understanding is negotiated. Vague terms are not enforceable.
- ☞ **Enforceability:** Mutual mistake, fraud, contracts of adhesion (shrink wraps) aren't generally enforceable in the U.S.

License Terms Most Often Negotiated

- ☞ Who can use the product (authorized users)
- ☞ Where can the product be used (authorized site)
- ☞ How can the product be used (authorized use)
- ☞ How much does it cost (number of users, copies)
- ☞ When and how are use rights terminated
- ☞ Liability for unauthorized uses/breach of contract
- ☞ What about the statutory/Berne Convention rights under copyright

Copyright Basics (a refresher)

Historical Summary of U.S. Law

- The Constitution invested Congress with right to provide protection for exclusive rights of authors
- First federal Copyright Statute-1790
- Major revision - 1909
- 2nd major overhaul - 1976, effective Jan. 1, 1978
- Computer programs added by amendment - 1980
- U. S. joins the Berne Convention, March 1, 1989
- Digital Millennium Copyright Act - 1998
- Copyright Term Extension Act - 1998

What is Copyrightable in the U.S./What Isn't

Copyrightable

- Literary Works
- Musical Works, both score and lyrics
- Pictorial/graphic works, art, sculpture, photographs
- Audiovisual Works, motion pictures, videos, video games
- Computer Software

Not Copyrightable

- Ideas or Concepts
- Lists (showing no originality)
- Factual information (including database content)
- Titles, phrases, slogans, logos
- Public Domain Information
 - Copyright term expired
 - Never copyrighted
 - Works of U.S. government employees

Copyright's "Bundle of Rights" and Statutory Exemptions

Bundle of Rights (monopoly)

- **Right to Reproduce** (Make one or more copies)
- **Prepare Derivative Works** (Including abstracts, enhancements, translations)
- **Right to Distribute** (Disseminate copies)
- **Right to Display Publicly**
- **Right to Perform Publicly**
- **Liability for Infringement**

Exemptions to monopoly

- **Library right to make single copies for patrons, Inter-library loan, archival rights**
- **Fair Use Rights for**
 - Criticism
 - Commentary
 - News reporting
 - Teaching, scholarship, research
- **Classroom Exemption for face-to-face teaching**

Licensing generally means A loss of Rights for the Library and Users

- Print Media/Copyright

- Right to use the resource:
purchaser, borrower, any library walk-in user
- Right to make copies: by permission, fair use, ILL, library photocopy and archive exemptions
- Right to distribute copies: by ILL, fair use, first sale
- Character of use: no restriction on how used
- Liability for misuse:
individual (rarely library) is liable for infringement

- Electronic Media/License

- Right to use the resource:
user/user group defined in license. No loans to “unauthorized users”
- Right to make copies: only as negotiated. If license fixes number of copies or defines authorized users, fair use, ILL lost
- Right to distribute copies: no right to distribute beyond “site”
- Character of use: may limit to academic only/no commercial use
- Liability for misuse: breach of contract, termination of license

More Complexity: Database Protection adds new laws applicable to electronic collections of information

The European Directive (Directive 96/9/EC - 1996)

- Protection provided for Databases (a collection of independent works, data, other materials arranged in a systematic or methodical way- individually accessible by electronic or other means)
 - Prevents extraction or reuse of whole or “substantial” part, evaluated qualitatively and/or quantitatively, of contents of the database
 - If there has been a substantial investment in either obtaining, verifying or prosecuting (formatting as a database) the contents
 - Protection provided for 15 years from the earlier of completion or first public availability - term reset by substantial change to database
 - Exceptions: Rights granted under license; may use for purposes of illustration for teaching/research (modified by national laws - i.e. UK-no commercial purpose)

More Complexity: Database Protection

Pending U.S. Legislation

– **H.R. 354-Collections of Information Antipiracy Act**

- ? 15 years of protection after offered for sale or used in commerce
- ? Establishes civil and criminal penalties for extraction of all/substantial part if it causes harm to the primary or related market of the owner
- ? Requires substantial investment (qualitative, quantitative)
- ? Has modified Fair Use test that looks at purpose of extraction; is it done in good faith; has the material been transformed; is the collection/extractor in same field

More Complexity: Database Protection

– H.R. 354 - Collections of Information Antipiracy Act

- ? No Fair Use if the used/extracted portion is to be offered for sale or used in commerce and is a substitute for all/part of the collection from which extraction is made
- ? “Fair Use” exemption only for “individual acts” - not systematic or part of a pattern
- ? Collections of government information are OK and may be protected if collected by non-government agent
- ? Nothing in this law interferes with rights/obligations under a license.

More Complexity: Database Protection

- **H.R. 1858 - Consumer and Investor Access to Information Act of 1999 (a better alternative)**

- ? Requires substantial duplication of a protected database
- ? Violation must be in competition with the protected database
- ? Exemption for extracting for purposes of education, research, scientific inquiry ok as long as not for direct competition
- ? Information in government databases can't be extracted and protected unless government gives permission
- ? Bill doesn't restrict licensing but lists licensing "misuses" i.e. inability to get license on reasonable terms; whether necessary for research/innovation; are terms a barrier to competition
- ? Enforcement is with the FTC under unfair trade practices

**Summary: Technological Changes in resource
delivery mean Libraries and Archives must
Change the way they do Business**

- ☞ Libraries must train personnel to be knowledgeable in the business of licensing to best serve their clientele
- ☞ Library personnel must understand the “technology” of electronic delivery
- ☞ Library personnel must understand the law as it relates to licensing transactions and keep abreast of changes in copyright and database law that impact electronic information products
- ☞ Institutions should consider putting in place a “team process” that includes all stakeholders in these acquisitions

Web-sites You may Wish to Bookmark

- **Association of Research Libraries (booklets and information on license training):**
<http://arl.cni.org/info/fm/copy/copytoc.htm>
- **U.S. Copyright Office**
<http://lcweb.loc.gov/copyright/>
- **University of Texas:**
<http://www.utsystem.edu/OGC/IntellectualProperty/cprtindx.html> (site lists links to all Fair Use Guidelines)
- **Indiana University:**
<http://www.iupui.edu/it/copyinfo/>
- **Stanford University's Fair Use Site:**
<http://fair.use.stanford.edu/>
- **Multimedia Law Home Page:**
<http://www.batnet.com/oikoumene/index.html>
- **Yale University Library (for sample license language):** <http://www.library.yale.edu/>